THE AMERICAN PHILOSOPHY OF GOVERNMENT AND ITS EFFECT ON INTERNATIONAL RELATIONS

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Until quite recent times, it would have been unprofitable, in the case of most nations, to inquire what the philosophy of government held by the people was, or what effect it had on the foreign relations of the nation, or on international relations generally. There were few nations in which the people were so enlightened and expressed themselves so fully that it was possible to distinguish and define the particular philosophy of government held by them; and even if it had been possible to do so, it would have been of little use to try to discover what effect this philosophy had on international relations, since the fact was that it had little or no effect. The people of each nation, ignorant of foreign affairs by reason of the difficulties of travel and communication, allowed the executive to control the foreign relations under the advice of a council in the selection of which they had no voice, and representing certain privileged classes of persons who used the power of the nation as means to accomplish such ends as they thought desirable.

So long as this condition of things was general, the rights of nations occupied the attention of writers. The rights of man, the rights of peoples, and the rights of society in general were ignored, as were the responsibilities which necessarily accompany all rights. Each nation sought to aggrandize itself by conquering and pillaging others, and the only restraint on one nation trespassing upon another was that all the so-called civilized nations were gradually forced, by the pressure of circumstances, to enter into the playing of a military game of forcible checks and balances, called "the balance of power" or "the political equilibrium."

The principle of this game was very simple, though, like most other games, the rules for playing it were very intricate. When any nation, for the purpose of direct gain by pillage of its neighbors or by despoilment of the natives of barbarous regions, or for the purpose of indirect gain by

destroying its competitors in trade or opening up new trading points, desired to conquer adjacent or distant regions,—thereby increasing its military and naval strength and paving the way for further expansion,—the surrounding nations combined their military and naval strength by alliances until the proposed expansion was balanced and checked, or until the opposing nations, or all the nations concerned, were "compensated" by partitioning between them some weak country which had been crushed in the course of the war. Thus what was called the *status quo* or the "political equilibrium" was maintained.

So long as the people of each nation remained unenlightened and were without full power to express their ideas through representative institutions, the war-game of "the balance of power" ruled international politics, and international disputes were disputes concerning the "rights of nations," and particularly on points of "national honor." The citizens of each nation had only partial and indefinite rights at home, and citizens of one nation had no rights in another nation or against a foreign government. A person abroad had only certain privileges, and these usually were based on treaty. Breaches of treaty were considered to involve the national honor not of the nation breaking the treaty, but of the other nation, and led to war or to a new disposition of alliances according to the rules of the war-game.

As the people became more enlightened, and obtained an increasing participation in their own government by representation and by compelling their governments to be responsible to them, there gradually arose in each nation a popular philosophy of government, in which the rights of individuals, of peoples, and of human society in general, were distinguished from the rights of nations. The houses of representative legislatures, and particularly the houses directly representing the people of the nation, as their members became increasingly better informed concerning foreign affairs through increased facilities for travel and intercourse, insisted with greater and greater force that the philosophy held by the people should have its effect upon foreign relations as well as upon domestic affairs. The war-game of the balance of power everywhere came under criticism. At the present time its principles are beginning to be known, and there is a growing understanding of its intricate rules. The classes and interests which have heretofore had the

monopoly of this knowledge, and which in all sorts of secret ways were able to use the nation and determine its moves, are being haled into the daylight and exposed to the destructive power of publicity. Indeed the danger at the present time is, that in the control by the people of each nation over national and international affairs, the just rights of nations to live and protect themselves, and to be the guardians of the rights of individuals, of peoples and of society at large, will be ignored, and that the whole structure of organized society will be weakened, to the detriment of individual liberty.

It becomes, therefore, important to consider the philosophy of government held by the people of each nation, and particularly of those which have advanced farthest along the path of popular government, for the purpose of ascertaining how this philosophy is likely to affect international relations. It is particularly desirable to consider the philosophy held by the people of the United States, and extended to its annexed countries, since this is one of the two great philosophies of popular government now prevailing in the world; the other being that held by the people of Great Britain, which has extended more or less completely to the self-governing states of the British Empire, and to the nations of the Continent of Europe.

Every philosophy of popular government tends to the establishment and enlargement of the rights of the individual. When we speak of "popular rights," we mean the rights of the individual. It is true we may speak of the rights of one people against another, or the rights of society against peoples, but these are figurative expressions. They all come down, in the last analysis, to the rights of the individual. The important thing, therefore, in examining a philosophy of government held by the people of a nation is, to reach a definite idea concerning what the rights of the individual are under this philosophy, into what classes and grades they are divided, how they are considered to arise, whether they are considered to be against the government or against all governments as well as against other individuals, and how it is considered they ought to be safeguarded.

The crux of the whole matter is, however, whether the individual, according to the philosophy of government held by the people of the nation has rights against the government, and, if so, why and to what

extent? It is particularly important to inquire whether they base the rights of the individual against the government on grounds which logically require them to hold that all individuals have rights against all governments. If the people of a nation do hold that there are rights of individuals against governments, and particularly if they hold this idea for reasons which, logically followed out, require them to hold that all individuals have rights against all governments, this philosophy is bound to have an effect upon international relations.

There can be no doubt but that the proposition that there are certain rights of the individual against the government does form the most fundamental part of the American philosophy of government. We are accustomed to see every branch of our government carefully scrutinizing every governmental action lest it may be found to infringe certain rights of the individual. Every governmental agency, from the Congress and the President downwards throughout the United States, and from the Legislature and Governor downwards throughout the States, is bound by certain express constitutional prohibitions which are designed for the protection of these rights, and if these constitutional prohibitions are infringed by governmental action, the action is nullified by the Supreme Court of the United States or by the court of final jurisdiction in the State. Thus the conception that there are certain rights of the individual against governments, which no government can infringe except upon penalty of having its act nullified, is a very living one among the people of the United States.

If the people of the United States held that these rights were merely rights which they thought it expedient for their citizens to have, their citizens would have these rights merely as citizens. Such a doctrine would make little difference to the rest of the world. Any rights which we think it merely expedient that our citizens should have at home are of course of little effect abroad. But we do not base our belief in these rights of the individual against the government upon any grounds of national expediency. We assert that every citizen of the United States has certain rights against all other persons and against all governments, because these rights arise out of the necessities of human nature and because it is essential to human society that every individual should have these rights. We say that these are "fundamental rights" and

are not only universal but are "unalienable"—that is, that persons cannot convey them to governments and thereby give governments absolute power over them. This makes our philosophy international, as well as national. Our people and all who dwell in our midst or under our jurisdiction, have fundamental rights against our governments not merely as citizens of the United States, or as under its protection or jurisdiction, but as human beings living in the society of other human beings. These fundamental rights, according to our philosophy, must therefore arise under a law growing out of the necessities of human nature, which is supreme over the United States and over all individuals, peoples and nations, and which arises from the act of a legislator external to the United States.

What then, are these fundamental rights which thus arise under a law made by the legislative act of a power external to and supreme over the United States, and what is this external and supreme law under which we consider these rights to exist?

The Declaration of Independence contains the only affirmative statement concerning these fundamental rights and this external and supreme law. In the preamble, it is said: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Thus the Declaration divides all rights of individuals into two classes. In the first class are certain unalienable rights with which each man is endowed by his Creator, and among which are the rights of life, liberty and the pursuit of happiness; in the second class are all other rights. This first class the Supreme Court of the United States calls "fundamental rights"; the second class it calls "artificial or remedial rights," since the rights of the second class must be consistent with and in aid of those of the first class. The fundamental rights are "recognized, but not created, by the Constitution" [1]—that is to say, by the people of the United States, through the Constitution. The artificial or remedial rights are created by the people or the government of the United States or by the peoples or the governments of the

[1] Logan *v.* United States, 144 U. S. 263, 293.

States. The Supreme Court says of these rights that they are "peculiar to our own system of jurisprudence": [2] thus distinguishing them from fundamental rights, which are of course, in our view, common to every system of jurisprudence, including the international system.

The definition of the fundamental rights of the individual as including his rights of "life, liberty and the pursuit of happiness," given in the Declaration, is too indefinite for practical use. When, however, we go back to the literature of the Revolutionary period and use it as a contemporary exposition of the meaning of these words, the definition becomes clear and practical. The fundamental or common rights are those corresponding to the common attributes which all men have as a necessary part of their human nature and as essential to the existence of human society. These attributes are life, the power to move and the power to use lands, things and forces in the pursuit of happiness. Inasmuch as these common attributes with which all are equally endowed by and at their creation give rise to common necessities, it follows, as we believe, that there must be a supreme and fundamental law of human society recognizing these common attributes and these common necessities and conferring rights upon each individual to satisfy his necessities. The fundamental rights of the individual may thus be stated to be the right to so live, to so move and to use such part of the land, things and physical forces of the universe for his support and happiness, as is consistent with the common and equal right of every other individual to such life, to such motion, and to the use of lands, things and forces for the same purpose. Though these fundamental rights cannot be alienated by any individual to any person or government, the individual may of course forfeit them to society for anti-human and anti-social acts done by him, and it is the function of governments, subject to the ultimate superintendence of the people of each nation, to adjudicate the total or partial forfeiture of these rights by due process of law and to enforce forfeitures so adjudicated. The right of an individual to use exclusively lands, things or forces, which we call property, is evidently to some extent a fundamental right and to some extent an artificial right. Thus the Declaration does not regard property as a fundamental right. On account, however, of the difficulty of determining the extent of property

[2] Downes *v.* Bidwell, 182 U. S. 244, 282.

which the individual may own as a matter of fundamental right, we protect all the property which an individual owns, equally with his life and liberty, so as to prevent it from being taken from him "without due process of law,"—thus requiring proper legislative action, proper judicial determination and proper executive action as a precedent to the forfeiture.

The nations which recognize the fundamental rights of the individual have various expedients for safeguarding them. These rights may evidently be infringed by individuals or by governments. The courts in every civilized country are the especial guardians of fundamental rights in so far as the customary law is concerned. Courts everywhere refuse to apply customs as rules of law when the customs are contrary to fundamental rights. But when the legislature has enacted a law, the courts of most nations are powerless to consider whether it infringes the fundamental rights of the individual. Thus, in most nations, the individual has no rights against the government, or at least against the legislative branch. Experience has shown, however, that each individual has quite as much to fear from the action of governments—even from the popular legislatures—in infringing his fundamental rights as from other individuals. A government, or the legislative part of it, is, after all, only a group of individuals, and it may, like any other group of individuals, violate the fundamental rights of individuals. Even if the government is directly responsible to the will of the majority of the electors, the majority may compel the government to violate the fundamental rights of the individual unless some way is found for nullifying such governmental acts even though commanded by the majority. The British system of responsible government recognizes the fundamental rights of the individual, but gives no protection to the individual against infringement of his rights by the government except by concentrating responsibility in a small committee called the Cabinet, and making the tenure of office of the Cabinet depend upon its having a majority in the popular House. The theory is that if the Cabinet attempts to induce any branch of the government to infringe the fundamental rights of the individual, or sanction such an infringement, it will lose its majority and go out of power, to be supplanted by a Cabinet which will see that these rights are protected.

The people of the United States have adopted a different method of protecting these fundamental rights. In the Constitution of the United States, and in the State Constitutions, are inserted prohibitions upon certain forms of governmental action found by experience to be likely to occur if not prohibited, and which endanger or destroy the fundamental rights of the individual. These prohibitions are the most fundamental parts of the Constitution, and no governmental powers can be exercised contrary to them. That is to say, they are supreme over all the rest of the Constitution and over all governmental action which the particular Constitution affects. The Supreme Court of the United States has said—to repeat what has been above quoted with its immediate context—that there are "certain fundamental rights, recognized and declared, but not granted or created by the Constitution, and thereby guaranteed against violation or infringement by the United States, or by the States, as the case may be." [3] The following is a collation of the provisions of the Constitution of the United States, prohibiting certain kinds of governmental action by the Government of the United States for the protection of fundamental rights, which has received the approval of the Supreme Court.[4]

That no person shall be deprived of life, liberty or property, without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense;

[3] Logan *v.* United States, 144 U. S. 263, 293.

[4] This collation was made in the Instructions of the President to the Commission for taking over the Civil Government of the Philippines from the Military Authorities, dated April 7, 1900, and is quoted in Kepner *v.* United States, 196 U. S. 100, 123. In those instructions it was declared that "there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom," and that "there are certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law." The above quoted constitutional prohibitions were spoken of as the "rules of government" which are "inviolable." See further on this subject an article on "The American Philosophy of Government and its Application to the Annexed Countries," by the author of this article, in the Proceedings of the American Political Science Association for 1913, Vol. 10, p. 76.

that excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed.

The Supreme Court has said of this collation of Constitutional prohibitions: [5]

These words are not strange to the American lawyer or to the student of Constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, as found in the nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the thirteenth amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles * * * were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

The Supreme Court has itself definitively attached to the rights secured by these Constitutional prohibitions the name of "fundamental rights." [6]

Substantially these same Constitutional prohibitions against governmental action are inserted in the Constitutions of the various States of the Union. Through the interpretation and application of these prohibitions of the Constitutional Bill of Rights, made by the Supreme Court of the United States as respects governmental action of the United States, and by the courts of final jurisdiction in the States as respects governmental action of the States, the principles of this supreme universal law under which the fundamental rights of the individual

[5] Kepner *v.* United States, 195 U. S. 100, 122, 123.

[6] Hawaii *v.* Mankichi, 190 U. S. 197, 217; Kepner *v.* United States, 195 U. S. 100, 123; Dorr *v.* United States, 195 U. S. 138, 144, 148.

exist, are being gradually evolved by a process of exclusion and inclusion. Of course the courts cannot be allowed to have absolute finality in making decisions of such great importance, which involve the interpretation and application of a law which is supreme over the people of every nation and over every nation, and the nullification of acts of popular legislatures. Where decisions made by courts are believed by the people of the nation to have been based on a wrong interpretation or application of these fundamental constitutional prohibitions—that is, on a wrong interpretation and application of this supreme universal law—the people of each State or of the nation may and doubtless ought to arrange for some appropriate process of revision, but every revisionary process must be so arranged and safeguarded that it will be most likely to result in the fundamental rights of the individual being secured to him. The practice of intrusting the courts of final jurisdiction with this great function is on the whole satisfactory to the people of the United States, since if the courts err they may also correct themselves in later decisions; and the theoretical right of the people to provide a revisionary tribunal or process or to exercise direct revisionary power, is not likely often to be insisted upon. There is great danger to the fundamental rights of the individual in revisionary action by direct popular vote, or even by a special tribunal or a special form of legislative action. The people of the United States are fully alive to these dangers, and there seems to be every probability that our system will never be essentially changed, and that such changes as are made will be for the purpose of rendering it more perfect.

It follows from the American philosophy of government that we regard all our organized communities—even the United States and the States—as corporations. The citizens of the State or of the nation are the members of the corporation, and the government is a governing agency or governing board. The object of all government, as we view it, is to secure the fundamental rights of the individual, and the powers of governments are limited to this purpose. Every organized community is, by virtue of the fact that it is a corporation, democratic and representative. Corporations may of course form themselves into a corporation and frequently do so when the operations are widely extended—the greater corporation so created being given superintending power for the

general purposes. We apply this same idea, and our States as corporations have formed themselves into a federal corporation or federal nation. Thus the American philosophy of government necessarily results in democratic, representative and federal institutions.

The fact that some of the peoples of the world are beginning to hold a philosophy of government which distinguishes between fundamental rights and artificial rights, has already had a profound effect upon international relations and is likely to have still greater effects; for out of the acceptance of the belief in fundamental rights grows the belief in the rights of individuals against governments, and of the propriety and necessity of constitutional prohibitions imposed by peoples or by society at large upon governments, for the protection of these rights. The individual thus becomes a subject of the public international law, as well as the nations. The old theory that international law, or the law of nations, was concerned solely with the rights of nations is already modified. We look at the real parties in interest, and discover that in an increasing number of cases an individual or a group or class of individuals is the real party on one side and a nation as a corporation the real party on the other. Individuals who are sojourning in a foreign nation often come into direct conflict with the government of the nation; and individual citizens of one nation frequently make contracts with a foreign nation. Thus the question arises in various ways, what rights have citizens of one nation against another nation?

Some European writers on public international law have already noticed the change which is taking place in the views held concerning the subjects of international law growing out of the increasing belief in the fundamental rights of the individual—the rights of man, as the French call them. Thus in the *Manual de Droit International Public*, by Bonfils, revised by Fauchille,[7] it is said:

> The nations, considered as members of the international community, are *par excellence* international persons. * * * But are they the only international persons? Yes, if one uses the expression "international persons" as synonymous with and equivalent to "members of the international community." But if, giving another meaning to this expression, one designates by the term "international persons" all the beings whose juridical situation is regulated by the public international

[7] 6th Ed. 1912, Pars. 154, 157.

law, whose rights and duties are determined and whose privileges are restricted by this law, as subjects of this branch of the law, the nations are not the only international persons.

Speaking of the individual man as one of the subjects of the public international law, these authors say:

Man, as a member of humanity, has an individuality of his own, says Pasquale Fiore, a sphere of action which may include all the regions of the globe, a juridical capacity belonging to him by reason of his mere existence and independent of that which may be recognized as pertaining to him as a citizen of a nation. * * * Heffter classes among the immediate subjects of international law man considered by himself, and the citizens of a nation in their relations with other nations. He develops his thesis by examining the primordial rights of man, of which the idea of personal liberty is the foundation, and which are not to be confounded with political or civil rights. * * *

Undoubtedly the individual man is not an international person of the same kind as the nations. Among other differences, there is one which is very marked: From the point of view of international law, the nation has a simple character, in that it is and can be subject only to international law. The individual man, however, has a composite and mixed character, in that he is, at one and the same time, subject to international law, and to the particular law, public and private, of his own nation. These two qualities exercise on each other a reflex influence. To refuse to regard the individual man as an individual person, is to sacrifice the first to the second.

Has not every man certain fundamental rights? Without regard to the nationality of the individual, are not the inviolability of the human person as against the slave trade, the security of private property as against piracy, now placed under the protection of international law?

These same writers have this to say regarding the rights of individuals, as citizens of a nation, against another nation:

Moreover, each individual, however isolated, has everywhere, as a native of a particular nation or as under its jurisdiction, certain rights based on the principles of international law. The violation of these rights is an injury, not only to the individual, but to the nation of which he is a citizen. The subject of the rights of the native inhabitants against a foreign conqueror, of the rights of foreigners to enjoy special rights against uncivilized natives, the subject of naturalization, and of emigration, fall within the jurisdiction, in varying degrees, both of international law and of national law. Do not disputes and conflicts arise between nations regarding emigration and naturalization? Is not the matter of the extradition of criminals, though it so profoundly concerns the individuals charged with crime, essentially a matter of public inter-

national law? In these cases, and in many others, the citizen of a nation finds himself in contact, in relationship or in conflict, not with the subjects of another nation, but with the nation itself. It is as respects this nation, as an international person, that the relationship must be determined, or the dispute settled. This relationship or this dispute is of an international kind and is subject to be determined by international law, just as analogous relationships or disputes arising between a nation and one of its own citizens are determined by the national law.

It is important to distinguish, as these writers do, between the claims of individuals against a foreign government based on violation by the foreign government of the fundamental rights of the individual and the claims of individuals against a foreign government based on violation by the foreign government of the rights which the individual has as a citizen of his own nation. The Constitution of the United States distinguishes between the two classes of cases. The Supreme Court of the United States has jurisdiction of all cases involving the fundamental rights of the individual (the Fourteenth Amendment having made the United States the guardian of fundamental rights against infringement by the States), regardless of whether the complainant is a citizen of the United States, or of the State of which he complains, or whether he is a foreigner. He claims these rights simply as a human being, and not as a citizen of the United States or of a State. In cases not involving fundamental rights, arising between a State and citizens of another State or between citizens of different States, or between a State, or the citizens thereof, and foreign states, citizens or subjects, the Supreme Court has jurisdiction by virtue of the citizenship of the parties. In this class of cases, the individual has rights only as a citizen of a State.

The truth seems to be that when an individual claims that his fundamental rights have been infringed by a government, whether the government is his own or a foreign one, he appeals neither to international law nor to national law, but to a law which is supreme over all peoples and all nations, and which grows out of our common human nature and the nature of human society. This law no people or nation can "create"; it can only "recognize" it. As respects rights that are not fundamental,—that is, which are artificial or remedial, each individual is subject to the rules of international law or of national law according to the nature of the case and according to the citizenship of the parties.

But as respects his fundamental rights, each individual and each government is subject to the rules of the fundamental and universal law which is supreme over both international and national law, and is pervasive throughout the whole society of peoples and nations regardless of national limits. Though the American people have in fact secured the fundamental rights of the individual by our own national law, through constitutional prohibitions, we do not regard these fundamental rights as created either by our own national law or by international law, but by a law universally pervasive and supreme over both, which we "recognize," and which we consider that we must recognize on penalty of reversion to barbarism. One may adopt the religious hypothesis and call this supreme universal law the law of God, or the philosophical hypothesis and call it the law of nature, or the juridical hypothesis and call it the law of human society. Perhaps the simplest way out of the difficulty of determining the source of this law is to regard it as a law made by human society as an organized unitary community, and to call it "the fundamental law," understanding by this that law which is supreme over all other human law, whether international, national or municipal, and which deals directly with the rights of the individual man as a human being as against all human society. As Bonfils and Fauchille say, slavery is abolished everywhere because society in general feels that it is in violation of the fundamental rights of the individual merely as a human being regardless of his citizenship, and hence destructive of all human society. That there are rights of the individual which he has merely as a human being and which follow him throughout the world, is proved by the fact that each enlightened human being, if he searches his own conscience, finds himself compelled so to believe. The existence of this law cannot be proved by ordinary methods of proof. It must be accepted as an axiomatic and self-evident truth.

The supremacy which the American people attribute to the fundamental law is what may be called a limited supremacy—a supremacy within a certain definite sphere. Just as the Constitution and laws and treaties of the United States are not supreme over the Constitutions and laws of the States for all purposes, but only for certain purposes which are in fact the general purposes of the Union, so the American people must necessarily believe that the public international law is supreme

only for the general purposes of the whole international society over national constitutions and laws; and so also they must necessarily believe the fundamental law is supreme over the public international law and all national constitutions and laws only for the still more general purpose of securing those fundamental rights of the individual which attach to him merely as a human being and not as a citizen of the international community or of a particular nation. Thus, according to the American view, there are four kinds of supreme law, but the supremacy of each is within a certain sphere. There are certain activities and relationships of an individual which are necessary to him as a human being equally with all other human beings. Questions concerning his rights to these activities and relationships, whether the rights are claimed against individuals or against the government, are to be determined according to the principles of the fundamental law. There are other activities and relationships which each individual claims and enjoys as a citizen of a nation in or against another nation or its citizens. These rights are determined by international law. There are still other rights which the individual claims and enjoys as a citizen of a particular nation within the nation. These rights are to be determined by the law of the nation of which he is a citizen. In federal states, there are rights which the citizen of a state enjoys within a state and which are exclusively determined by the law of the state. At present the old rule which made all governmental action of cities and towns legally subordinate to the governmental action of the state applies, but there are signs that there is arising a conception of certain rights which a citizen enjoys as a citizen of the city or town. The courts within the United States actually apply these principles as a matter of course in their decision of cases. If, under the facts of the particular case and the issues formed in the case, the fundamental rights of the individual are involved, the constitutional prohibitions for the security of fundamental rights are applied. If, under the facts and issues, the rights of the individual as a citizen of a nation in or against a foreign nation, or as a citizen of a foreign nation against the nation or a State, are involved, the case is decided by international law; if the rights of the individual as a citizen of a State against another State or of citizens of one State against citizens of another are involved, the case is determined by the law of the United States; if the

rights of the individual as a citizen of a State within the State are involved, the case is determined by State law.

This hierarchy of laws springs, as has been seen, from a hierarchy of communities. At the top stands all human society regarded as a single corporate unit, which is the theoretical legislator of the fundamental law under which each individual has certain rights against all other individuals and all governments, simply as a human being belonging to this society by reason of his creation as a human being. Next comes the federalistic organization composed of all the nations of the world—or all the civilized nations—regarded as a consociation of nations. This consociation is the legislator of international law or the law of the society of nations, under which each citizen of a nation has certain rights against other nations and their citizens, and rights in the high seas and other property common to all the nations. Next come the particular nations, each of which is the legislator of its national law under which each citizen of the nation has certain rights within the nation. In federal states, the nation is the legislator of the national law and the State of the State law, and each citizen of a State has certain rights under State law within the State, different from his rights as a citizen of the nation.

The doctrine of fundamental rights has, however, no more necessary connection with the idea of the federal state or nation than with that of the unitary state or nation. It is equally necessary for the people of a unitary nation, as for those of a federal one, to recognize the fundamental law and to protect the fundamental rights of the individual against all other individuals and against all governments by constitutional prohibitions against certain forms of governmental action. This is evidenced in the United States by the fact that the people of the States impose the same prohibitions upon their State governments that the people of the United States impose upon the Federal Government. It is probably equally true that the idea of a federal state or nation gives rise to the idea of a fundamental law of human society as a whole and of fundamental rights under this law, and that the idea of fundamental rights under a fundamental law made by human society as a whole gives rise to the idea of a federal state or nation. But it is also true that a people may have an idea of a universal society, of fundamental law and

of fundamental rights, without having any experience of a federal state or nation, and even though they believe in the unitary rather than the federal form of organization. France, with its idea of the rights of man, and Great Britain with its idea of fundamental rights derived from the constitutional prohibitions upon certain forms of governmental action found by experience to be dangerous or destructive to these rights, show that the conception of a fundamental law and fundamental rights has no necessary connection with the federal form of government. The constitutional prohibitions adopted by the people of the United States in the Constitutional Bill of Rights are in fact collated from Magna Charta, from the English Petition of Right, from the English Habeas Corpus Act, and from the English Bill of Rights, as these were developed in the Massachusetts Body of Liberties, in the Virginia Declaration of Rights and in the original Constitutions of the States of the American Union.

The real difference between the United States and other nations is thus not so much one of the philosophy of government, as of the system which we apply to make the fundamental law and the fundamental rights of the individual practical and effective. No other nation imposes constitutional prohibitions for the protection of these rights upon all its governments and all their branches and makes these prohibitions the most fundamental part of the supreme law of the land so as to make the courts the guardians of these fundamental rights. Though we may believe that this system is not perfect, it has the tremendous advantage of keeping the conception of fundamental law and fundamental rights alive in the minds and consciences of the people. The knowledge that the most insignificant individual may call to his aid the protection of the courts against the acts of his State legislature and even against the acts of the national Congress if these acts violate these fundamental constitutional prohibitions, dignifies the individual and keeps before the mind of all the people the moral worth of each human being simply as a human being, a creation of God, and a member of human society. It dignifies government by enabling the people to regard it in its proper aspect as an agency of the people having for the sole object of its institution the welfare and development of the individual. It compels the public official to exercise his power by judgment, since he is obliged in each case to

decide before he acts whether he is acting within the jurisdiction assigned to him as an agent of the people to secure fundamental rights. There is no particular virtue in written constitutions in so far as they merely determine the frame of organization of the government and the distribution of functions between the different branches of the government and the different corporate members of the nation. Their virtue lies in the possibility of establishing, by means of them, constitutional prohibitions for the protection of the fundamental rights of the individual, and of making these prohibitions the fundamental part of the supreme law of the land. The limitations of power as between the different branches of government and the different corporate members of the nation may be established under unwritten constitutions, but the limitations of the power of a government as between itself and the individual can only be effectively established by a written constitution enacted by the people, in which are inserted constitutional prohibitions for the protection of the fundamental rights, which are by the people declared to be the fundamental part of the supreme law of the land, and which are interpreted and applied by the courts, subject perhaps to revision, in extraordinary cases, by an extraordinary tribunal established for the purpose.

It is because the people of the United States believe that they have a peculiar system of government which is essential not only to their own liberty and their own society, but to individual liberty and human society everywhere, and which they hold in trust for civilization, that they feel it their duty to protect their philosophy and their governmental system from such contact with other systems as might endanger its existence. This was the original basis of the Monroe Doctrine, and still continues to be its true basis. The belief in the fundamental rights of the individual which we hold, destroys all motive for conquest, since the only effect of conquest by us is to place upon us the difficult task of securing the fundamental rights of the individual in the countries annexed. We welcome the independence of nations which accept our philosophy and which honestly recognize the fundamental law and do their utmost to preserve fundamental rights. The rights of intervention in the affairs of the South American Republics, for the purpose of controlling them in the interest of Europe, was claimed in 1823 by the

allied powers of Continental Europe as a logical result of their political philosophy and system. President Monroe declared that "the political system of the allied Powers is essentially different in this respect from that of America" and that "this difference proceeds from that which exists in their respective governments." Asserting that "to the defense of our own system, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, this whole nation is devoted," he concluded that we owed it "to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any part of this hemisphere as dangerous to our peace and safety."

The whole effect of the Monroe Doctrine was that the American people were determined that their philosophy and their system should have every chance of surviving in the competition of philosophies and systems to which it could reasonably be thought to be entitled. The philosophy of government then prevailing in Continental Europe denied the fundamental rights of the individual and asserted that all rights of men were created by the nation. The republics of Central and South America having established themselves and having nominally accepted the American philosophy of government and to some extent the American system, the United States asserted that the people of these nations should be free to develop themselves, hoping and believing that in the course of time they would fully accept the American philosophy of government and apply it effectively in their national affairs. The Monroe Doctrine is thus a doctrine of freedom. It had its origin in a conflict of philosophies. It had for its purpose the protection of the Central and South American Republics in developing and working out a philosophy and system which they had freely chosen. The Monroe Doctrine will die when nations of the world accept the belief in the fundamental rights of the individual and make these rights practical and effective; for by the acceptance of this belief and by the adoption of a practical system in accordance with this belief, all motive for conquest ceases, and nations will refrain from interfering in the internal affairs of other nations, since intervention will carry with it the heavy responsibility of securing the fundamental rights of the people of the invaded

country, without possibility of great gains, and with only an uncertain compensation.

The fact that the American people hold this philosophy of government in which the securing of the fundamental rights of the individual is regarded as the object for which all government is instituted among men, profoundly affects the attitude which American statesmen must take in respect to every question growing out of our foreign as well as our domestic relations. The officials of our Department of Foreign Affairs—which for historical reasons we call the Department of State—as well as our diplomatic officials, accustomed to regard the fundamental rights of the individual as the matter of prime importance, inevitably and properly apply our own constitutional tests to all proposals for joint action between the United States and any other nation, in the solution of questions arising between this nation and any other. To them the old conception of sovereignty, as a power of each nation to do what it wills, is impossible, since our philosophy compels us to hold that all national action is limited by the fundamental law.

The American philosophy and system of government—or more properly, the failure of other nations to accept our philosophy and system—particularly stands in the way of international arbitration and the judicial settlement of international disputes. With the drawing together of the whole world by the increased facilities for travel and communication, disputes tend more and more to be between an individual and a government or some branch of it. In every case of this kind there is a possibility that the question of the fundamental rights of the individual may be involved, so that in a similar case arising in the United States, the constitutional prohibitions for the protection of fundamental rights would be applied by the courts and the governmental action in question might be nullified. In this class of cases, when the United States is asked to submit to arbitration or judicial settlement, a grave difficulty arises. Inasmuch as the peoples of foreign nations do not impose constitutional prohibitions on their governments for the protection of fundamental rights and do not make these prohibitions the fundamental law of the land, the courts and the lawyers of European countries are not accustomed to issues being raised concerning the validity of acts of government as respects fundamental rights. As it is

necessary that European jurists should be in the majority on most arbitral or judicial tribunals in international cases, it follows that these tribunals are likely to treat some governmental acts as valid which we would hold invalid and nullify as infringing fundamental rights. Thus the United States must, for the protection and preservation of its own philosophy and system, refrain from submitting to the decision of such a tribunal any case which, if arising within the United States, would be considered as involving the fundamental rights of the individual under our constitutional prohibitions. So long as this difference in philosophies and systems continues, the only hope for the extension of international arbitration or judicial settlement would seem to be in making all action of international arbitral or judicial tribunals advisory to the nations which are the parties. This would permit these nations themselves to review the decision from every standpoint and to protect their own philosophies and systems. Acceptance of a decision by the parties would greatly increase its weight as a precedent for other nations, and would insure the execution of the decision by the defeated party.

The American philosophy of government also stands in the way of the codification of international law. No American can, consistently with his own fundamental beliefs, subscribe to a code of international law which does not contain constitutional prohibitions forbidding to all peoples, nations and governments certain forms of action dangerous to or destructive of fundamental rights, and which does not make these constitutional prohibitions fundamental and supreme over all international and national law.

The United States is therefore at the present time in one sense a disturbing factor in the councils of the nations. Its disturbance is not of a physical kind, but of an intellectual and spiritual kind. It brings to the discussion of all international questions ideas of universal law, of fundamental rights of the individual as a created human being, of practical protection of these rights through constitutional prohibitions on all governments, based on popular and national recognition of fundamental law. To some these ideas may seem to be destructive, but they are really in the highest sense conservative and constructive; for the recognition of the rights of man is in no sense inconsistent with the recognition of the rights of nations. The American philosophy equally recog-

nizes the rights of man and the rights of nations, holding that society can exist only through local organization, and that nations acting independently, but in concert, are the most appropriate means of securing the individual in his fundamental rights and in aiding him to extend his powers over nature.

The philosophy of the United States makes for peace. The wars which the United States has fought have all been for the purpose of protecting the fundamental rights of the individual and maintaining the nation as the guardian of these rights. There can be no true peace except where the individual has his fundamental rights, and where these rights are secured to him by the power of a nation. It is unlikely that the United States will ever apply physical force externally in the future except for the same purposes for which it has waged wars in the past. Such protective and defensive action its philosophy permits and in some cases demands.

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